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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO SALVADOR MARTINEZ, Defendant and Appellant.	H022869 (Santa Clara County Super. Ct. No. C9946292)

Defendant Fernando Salvador Martinez, facing multiple sentences of 25 years to life after a September 16, 1999, second-degree robbery, testified for the prosecution in another case and was ultimately offered one 25-year-to-life sentence on the robbery. He accepted the deal, was convicted and sentenced, and then offered the district attorney more information. At the district attorney's request, the court set aside the sentence on April 25, 2000. Almost 10 months later, defendant was returned to the court for resentencing. He moved to withdraw his plea because "he thinks that he had something worked out with the District Attorney's Office which has not worked out, . . ." The motion was denied. On appeal, in addition to other points, he asserts that the court erred in refusing to exercise its discretion to consider the motion to withdraw the plea.

FACTS

On September 16, 1999, defendant used force and fear to take money from Tran Nguyen. A complaint alleging one count of second degree robbery (Pen. Code §§ 211,

212.5, subd. (c))[1] and numerous "strike" priors and prison priors was filed on October 1, 1999. According to the reporter's transcript, on February 17, 2000, after a plea bargain was reached, an amended complaint alleging 23 counts was filed, each one of which could have carried a sentence of 25 years to life. The prosecutor offered to dismiss all counts except for one count of second degree robbery and five prior strike convictions and one prison prior which defendant would admit and for which he would receive a term of 25 years to life in state prison.

Thereafter, defendant wrote a letter to the district attorney offering further information. On April 25, 2000, with the expectation that the District Attorney's office would agree to a more lenient sentence, the trial court set aside the sentence and set resentencing for the end of August. About two months before resentencing, however, the court pointed out to the district attorney "that what he was proposing to do to [defendant]'s sentence was not legally correct, it couldn't be done under the Three Strikes law. And after some discussion in the District Attorney's Office," defense counsel stated, "I think that they were persuaded that you [the judge] were correct about that and now they simply are asking that we go back to where we were in March of last year."

Defendant next appeared before the court on February 6, 2001, for resentencing. Because the district attorney reneged on the more lenient sentence, defendant moved to withdraw his plea. His attorney stated that "he feels that he's been betrayed and misled, and he would like to withdraw his plea." The court responded, "Very well. The motion to withdraw the plea is denied." Defendant then spoke up. He stated, "originally when I pleaded guilty [*sic*] I had testified in front of the grand jury on the case with Larry Cortinas, and that was to get a lighter sentence." The court asked if that occurred before the plea, and defendant said that it had. "And now when we came back and did the five-year thing, now the D.A. doesn't want to give it because it was an illegal sentence to give."

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[1] Further statutory references are to the Penal Code unless otherwise stated.

The court stated that sentence was originally imposed on March 7, 2000, and added, "[t]hat is well beyond the 120 days which the Court has within which to review a sentence, so I will still abide by the ruling. [¶] The motion to withdraw the plea is denied." However, defense counsel reminded the court that the sentence had been set aside, and stated, "[t]hat's why [defendant] is now asking to withdraw his plea since he technically is unsentenced at this point." The court stated, "I'm prepared to sentence at this time." Defense counsel asked, "Are you denying the motion now realizing what the situation is?" The court answered, "Yes. I'm denying the motion to set aside the plea. We're at the point now of sentencing." The court reimposed the 25-year-to-life term and ordered defendant to pay two $200 restitution fines, one of which it suspended. This appeal ensued.

ISSUES ON APPEAL

Defendant complains that the court erred in refusing to exercise its discretion to consider the motion to withdraw the plea; the court erred in failing to resentence defendant within 20 judicial days of the recall; and the court failed to properly admonish defendant as to the rights he waived when admitting the prior convictions.

MOTION TO WITHDRAW THE PLEA

Defendant states that "[t]he trial court gave short shrift to [defendant]'s motion to withdraw his plea, because it believed it did not have jurisdiction to entertain it" when it stated that the motion was "well beyond the 120 days which the Court has within which to review a sentence, . . ."

The record refutes that contention. Once defense counsel reminded the court of the chronology of the case, the court answered affirmatively counsel's question "[a]re you denying the motion now realizing what the situation is?" The court allowed counsel and the defendant to address the court on the merits of the motion to withdraw the plea. After hearing defendant's statement, the court denied the motion.

Nevertheless, defendant asserts that he did not have a hearing on his motion to withdraw the plea. He states that the "trial judge eventually heard from [defendant], though

without his counsel's assistance, . . . [The court] did not consider his contentions on the merits." However, defendant admits, "[i]t was only after [defendant] insisted on speaking personally that the court heard defendant's reasons in full."

To exercise judicial discretion, "a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "Penal Code section 1018 permits the withdrawal of a guilty plea for good cause and requires liberal construction of its provisions to promote justice. However, the promotion of justice includes a consideration of the rights of the prosecution, which is entitled not to have a guilty plea withdrawn without good cause. [Citation.] '[T]he withdrawal of a plea of nolo contendere . . . is within the sound discretion of the trial court after due consideration of the factors necessary to bring about a just result.' [Citation.]" (*People v. Hightower* (1990) 224 Cal.App.3d 923, 928.)

At the hearing on the plea, the defendant must establish by clear and convincing evidence that his or her free and clear judgment was overreached by mistake, ignorance, inadvertence, or any other factor. (*People v. Griffin* (1950) 100 Cal.App.2d 546, 548.)

In the instant case, the prosecutor offered the original plea bargain after defendant testified before a grand jury in another case. Defendant accepted and was sentenced. Thereafter, defendant agreed to give additional testimony and deputy district attorney Charles Slone procured the recall of defendant's sentence with the agreement of a "prospect of change of sentence." Section 1170, subdivision (d), allows a trial court to recall a sentence for any reason that could influence sentencing generally, even if it arose after the original commitment. Once a sentence is recalled, the court may make any decision that it could have made before the defendant was sentenced, except that it may not impose a harsher sentence. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262.)

Slone was not present on February 6 when defendant was present for resentencing and requested to withdraw his plea. The prosecutor who was present stated he was "filling in for Charlie Slone this morning" and that he "understood [defendant] was going to be sentenced as per the original agreement." The prosecutor said nothing during the ensuing discussion about withdrawing the plea. The record does show that defendant was returned to court to continue sentencing on several occasions between the April 25 hearing and the February 6 hearing. The extent of defendant's cooperation between the setting aside of the sentence and the motion to withdraw the plea is not in the record. It is significant, however, that defendant does not claim that he gave the additional testimony or in any way changed his position in detrimental reliance upon the prosecutor's promise but was not given the benefit of his bargain.

Since the court "heard defendant's reasons in full," which defendant admitted in his brief, and defendant did not establish good cause for withdrawal of the plea, there was no error in denying the motion.

RESENTENCING

Next, defendant claims the court erred in failing to resentence him within 20 judicial days of recall of the sentence and in failing to obtain a time waiver for resentencing. Defendant relies on section 1191 for the provision that "the court shall appoint a time for pronouncing judgment, which shall be within 20 judicial days after the verdict, finding, or plea of guilty, . . ." "[T]ime limits on the pronouncement of sentence are not jurisdictional, but are waivable by the parties. [Citations.]" (*Dix v. Superior Court*, *supra*, 53 Cal.3d at p. 464.)

Defendant claims he was prejudiced by the failure to resentence him within 20 days because the court "believed that it did not have discretion to consider [defendant's] motion to withdraw his plea because more than 120 days had elapsed. If the sentencing had taken place 20 days after the initial recall, only 69 days would have elapsed, and the court would not have thought it lacked discretion to consider the motion."

We have rejected the foundation stone for this argument. The record establishes that the court's denial of defendant's motion to withdraw his plea was not ultimately based on the court's misapprehension that it could not consider the motion because more than 120 days elapsed. Thus, "[a]lthough section 1191 provides that the judgment must be pronounced within a designated period, it has been consistently held that failure to pronounce judgment within the time specified is not jurisdictional. . . . [and] 'does not automatically entitle the defendant to a new trial under the provisions of section 1202 of the Penal Code, nor does such delay render the judgment void for lack of jurisdiction. A judgment so pronounced may not be reversed on appeal unless the delay results in a miscarriage of justice . . . .' " (*People v. Williams* (1944) 24 Cal.2d 848, 850.) Since we have found that defendant was not prejudiced by the court's temporarily held belief, there was no miscarriage of justice.

WAIVER OF RIGHTS

Finally, defendant asserts that the court failed to properly admonish him as to the rights he waived when admitting the prior convictions. Trial courts are constitutionally required to advise defendants who intend to admit prior convictions that they have the right to a jury trial on the prior, the right to confront and cross-examine witnesses, and the right against self-incrimination, the *Boykin/Tahl* rights. (*In re Yurko* (1974) 10 Cal.3d 857, 861-865, citing *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.) "The Supreme Court later held that '*Yurko* error involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.' [Citation.]" (*People v. Campbell* (1999) 76 Cal.App.4th 305, 310.)

In our case, the trial court asked defendant, "Now do you know that by pleading guilty [*sic*] to the charge in Count 1 that you'll be giving up certain valuable constitutional rights? [¶] THE DEFENDANT: Yes. [¶] THE COURT: You understand also that with

respect to the allegations of prior convictions that you'll also be giving up certain valuable constitutional rights? [¶] THE DEFENDANT: Yes. [¶] THE COURT: Those rights are as follows: . . ." The court then advised defendant he had the right to a jury trial or trial by a judge without a jury, a right to a preliminary examination and that in a preliminary examination or at a trial, defendant would have the right to confront and cross-examine witnesses, to testify in his own behalf, to subpoena witnesses on his behalf, and to be free from self-incrimination. After the advisement of each right, the court asked defendant if he understood that right and after defendant's affirmative response, if he gave up that right. Defendant answered, "Yes." After the court informed defendant of the consequences of his plea and accepted the no contest plea, the court read the allegations of the five "strike" prior convictions and the prison prior. After each allegation, the court asked if defendant understood the allegation. Defendant answered, "Yes." The court then asked if defendant admitted "each of those five allegations of prior conviction?" and defendant answered, "Yeah." Defendant also admitted the prison prior.

This record shows that the admission of the priors was voluntary and intelligent under the totality of the circumstances. (*People v. Campbell, supra,* 76 Cal.App.4th at p. 310.) Although the trial court compressed the advisement and waiver of rights into one advisement aimed at both the change of plea and the admission of the prior convictions, it notified defendant separately that he had "valuable constitutional rights" for each purpose. (See *People v. Forrest* (1990) 221 Cal.App.3d 675, 681.) Furthermore, defendant was advised of the rights for both purposes in the same proceeding. In addition, defense counsel stated on the record that she also advised defendant of his rights prior to the plea. (See *People v. McMillan* (1971) 15 Cal.App.3d 576, 581 [defense counsel's advisement of constitutional rights before the change of plea was sufficient although defendant did not receive *Boykin/Tahl* rights from the court].) Defendant answered clearly that he understood and waived the rights. The court did not fail to provide the necessary admonitions.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Wunderlich, J.